Supreme Court, U.S.
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No. 07-___

IN THE

Supreme Court of the United States

CHARLES WILLIAMS,
Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
JAMES MCDONOUGH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does An Arrestee's Post-*Miranda* Response "I've Touched Her . . . But I Don't Want To Incriminate Myself" Effectively Invoke The Right To Remain Silent, Or Does The Rule Of *United States v. Davis*, 512 U.S. 452 (1994), Requiring Unequivocal Invocation Of The Right To Counsel Replace *Miranda*'s "In Any Manner" Rule.

II. Whether, After Receiving *Miranda* Warnings Promising That He May Remain Silent, An Arrestee's Response "I Don't Want To Incriminate Myself" Violates *Doyle v. Ohio*, 426 U.S. 610 (1976), When Used By The Prosecutor As Evidence Of Guilt In The State's Case In Chief.

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No. 07-__

CHARLES WILLIAMS,
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SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Charles Williams respectfully petitions for a writ of certiorari to review the decision and opinion of the United States Court of Appeals for the Eleventh Circuit entered on September 15, 2006 in *Williams v. Secretary for Dept. of Corrections*, 195 Fed. Appx. 939 (11th Cir. 2006).

OPINIONS BELOW

A copy of the panel opinion affirming the denial of Williams' petition for a writ of habeas corpus is attached as Appendix A. A copy of the order denying Williams' petition for rehearing en banc is attached as Appendix B.

STATEMENT OF JURISDICTION

The final decision of the United States Court of Appeals for the Eleventh Circuit was entered on September 15, 2006. This petition is timely filed pursuant to S. Ct. Rule 13.1. This Court's jurisdiction is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, U.S. Constitution: "No person shall. . . be compelled in any criminal case to be a witness against himself. . . ."

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254.

STATEMENT OF THE CASE AND FACTS

Procedural History

Defendant was convicted in the Circuit Court of Broward County, Florida of several counts of sexual battery without force on a minor and several counts of indecent assault on a person under the age of 16. The trial court sentenced him to life without parole on Count I and 50 years consecutive to Count I on Counts II-XIII, running concurrently with each other. On direct appeal, the court affirmed. *Williams v. State*, 755 So. 2d 714 (Fla. Dist. Ct. App. 1999).

Defendant filed a motion for post conviction relief pursuant to Fla. R. Crim. P. 3.850. (PCR1:8).[1] He claimed ineffective assistance of counsel for failure of defense counsel to move to suppress the "I-don't-want-to-incriminate-myself" portion of his post-*Miranda* response to custodial questioning by police.

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[1] PCR refers to the record of state post conviction proceedings. R _:__ refers to the state trial transcript. DE# ___:___ denotes proceedings in the U.S. District Court.

The judge denied the motion. (PCR1:77). Williams presented the issue on appeal. The Florida Fourth District Court of Appeal affirmed the denial of post conviction relief.

Williams timely filed a federal petition for writ of habeas corpus. (DE#1). The District Court found that Petitioner had exhausted his state remedies, that the issue herein was "ripe for review" on federal habeas, and denied the petition on the merits. (DE# 24:27). Petitioner appealed (DE#26), and the District Court issued a certificate of appealability on the claim of ineffective assistance of counsel relating to Petitioner's post-*Miranda* statement to Detective Murray. (DE#29).

On appeal to the Eleventh Circuit, the panel affirmed denial of the writ in an unpublished opinion (Appendix A). The court of appeals ruled that Petitioner's custodial statement to Detective Murray, "I don't want to incriminate myself," was too equivocal to trigger the constitutional protection of *Miranda*. Petitioner timely filed a petition for rehearing en banc. It was denied May 3, 2007 (Appendix B).

Statement of the Facts

During the time he was breaking up with his live-in companion Manon Boyer, she accused Mr. Williams of sexually molesting her daughter Melanie. After Williams was arrested and advised of his *Miranda* rights, he signed a *Miranda* waiver form. (R4:304). Detective Murray then confronted Williams with the girl's accusations. Williams' response to Murray is rendered by the court reporter as part paraphrase and part quote:

> A. His response was this is being blown out of proportion. He told me, "I've touched her. She is always teasing me, but I don't want to incriminate myself."

(R4:307). Williams spoke the words in question shortly after he had signed a *Miranda* waiver form stating that "if you

decide to answer my questions now, you still have the right to stop answering at any time . . . ." (R4:305). Murray testified at trial that he understood Williams' response as an invocation of Defendant's *Miranda* rights and discontinued interrogation. (R4:310). Defense counsel's objection to Murray's narrative of Williams' post-*Miranda* response was overruled. (R4: 308).

The prosecutor called the jury's attention to the "I-don't-want-to incriminate-myself" statement three times, the first time in opening statement (R4:164). When defense counsel objected (R4:164), the trial judge cautioned the prosecutor, "Stay away from saying he didn't say anything." (R4:165). But he did not; he elicited more of the same in direct examination of Detective Murray. (R4:307, 309, 310). The court overruled the defense objection. (R4:308). The prosecutor expanded on the actual statement in both opening (R4:164) and in summation: "Yes, I've touched her, but I am not saying anything *else*. I don't want to implicate myself." (R6:421). (emphasis added). Defense objections were overruled. (R4:308; R6:421).

Defense counsel did not file a pretrial motion to suppress Williams' invocation of his rights to Detective Murray in whole or in part. Fla. R. Crim. P. 3.190(i)(2) mandates the filing of a motion to suppress an illegally obtained admission *before* trial.

During deliberations, the jurors asked to see Williams' "confession." (R6: 466). "[W]e want the confession, you know, the paper he put right here . . . when the police spoke to him the first time." (R6:466). The judge explained that it was "just a form waiving his rights." (R6:466-67). The jury also asked about Williams' statements surrounding his waiver of *Miranda:* "Was [sic] there any statements?" (R6:467). The court instructed them that "you need to rely on what the witnesses testified to; okay?" *Id.*

The jury convicted Williams on all counts.

SUMMARY OF ARGUMENT

The lower court's opinion is clearly contrary to *Miranda v. Arizona*, 384 U.S. 436, 473 (1966), and later cases protecting the right to remain silent after *Miranda* warnings have been given. The decision below is not based on deference to state court fact-finding or other decision-making under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Although this is a habeas case, the issues presented herein arise equally on direct appeal: whether *Miranda*'s protection of the right of an arrestee to remain silent should be substantially undermined by (1) erecting artificial barriers to the ability of an arrestee to invoke that right and (2) then punishing the arrestee at trial by allowing the prosecutor to use the failed invocation as substantive evidence of guilt in the State's case in chief.

This Court should grant review because the Eleventh Circuit's holding conflicts with *Miranda*. It also represents the dominant trend among the circuits to impose "strict standards when evaluating claims of invocation of silence." *Soffar v. Cockrell*, 300 F.3d 588, 594 (5th Cir. 2002). Under *Miranda*, police cannot question a suspect if he indicates "in any manner" that he does not want to talk. *Miranda v. Arizona*, 384 U.S. at 473. Further,

> . . . it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

Id. at 468 n.37.

Doyle v. Ohio, 426 U.S. 610 (1976), completes the analysis by banning even the impeachment use of post-*Miranda* silence or claim of privilege. "*Doyle* and subsequent cases have . . . made clear that breaching the implied assurance of

the *Miranda* warnings [that there will be no penalty] is an affront to the fundamental fairness that the due process clause requires." *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986). "*Miranda* warnings contain an implied promise, rooted in the Constitution, that silence will carry no penalty." *Id.* at 295. Silence "includes the statement of the desire to remain silent. . . ." *Id.* at 295 n.13.

The Eleventh Circuit rejects these principles because it, along with other circuits, mistakenly overrides *Miranda* with the rule of *Davis v. United States*, 512 U.S. 452 (1994), that invocation must be unequivocal. Assuming *arguendo* that in context Williams' statement "I don't want to incriminate myself" is equivocal, it was sufficient under *Miranda*'s "in any manner rule" to require police to cease questioning. Further, evidence of even an equivocal invocation of the right to silence cannot be introduced at trial or argued by the prosecutor without violating the Constitution. *Doyle*, 426 U.S. at 619. It cannot be used even for impeachment of a testifying defendant. *Id.* Williams did not testify.

Here, the prosecutor trebled the harm. He introduced Williams' invocation through Detective Murray's testimony; and he commented upon it in both opening statement and in summation. The cumulative impact of repetitive mention of "I don't want to incriminate myself" was extremely harmful to Williams, shining the flashing red light of prejudice on him. The jurors perceived evidence of his invocation of the right to remain silent as a "confession." This is apparent from their request for the "paper . . . when the police spoke to him the first time" and their inquiry about what Williams said surrounding his invocation of rights. (R6:467).

The lower courts' rejection of this claim violated the AEDPA because it was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(2). Williams' post-*Miranda* statement "I

don't want to incriminate myself" is an invocation of the right to remain silent under the *Miranda* "in any manner" rule. The *Davis* unequivocal-invocation rule applies only to invoking the right to counsel. Petitioner's right to the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), was violated by defense counsel's failure to enforce Petitioner's rights under *Miranda, i.e.*, he did not move to suppress Williams' statement invoking his right to silence.

REASONS FOR GRANTING THE WRIT

I. The *Miranda* "In Any Manner" Rule For An Arrestee To Invoke The Right To Remain Silent Has Not *Sub Silentio* Been Replaced By The *Davis* Unequivocal Invocation Rule For Invoking The Right To Counsel.

A. The Opinion Below Directly Contradicts the *Miranda* "In Any Manner" Rule.

The *Miranda* rule for a suspect in police custody to invoke the right to remain silent is crystal clear, twice stated by the Court: "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74. This repeats the Court's earlier admonition that police must honor an invocation made "in any manner and at any stage of the process." *Id.* at 444.

It is axiomatic that that a court of appeals cannot overrule Supreme Court precedent, yet the Eleventh Circuit's position directly contradicts this simple rule:

> To avail himself of the right to remain silent, a defendant must make an unequivocal invocation of that right. *Coleman v. Singletary*, 30 F.3d 1420,

> 1424 (11th Cir. 1994); *see Davis v. United States*, 512 U.S. 452, 461-62, 114 S. Ct. 2350, 2356 (1994). The "primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis*, 512 U.S. at 460, 114 S. Ct. at 2356.

Williams, 195 Fed. Appx. at 940.

The panel's reliance upon *United States v. Davis*, 512 U.S. 452 (1994), in denying relief is wrong. *Davis* is strictly a right-to-counsel case. "[W]e decide how law enforcement officers should respond when a suspect makes a reference to *counsel* that is insufficiently clear to invoke the *Edwards* [*v. Arizona*, 451 U.S. 477 (1981)] prohibition on further questioning." *Davis*, 512 U.S. at 454 (emphasis added). *Davis* does not address the right to remain silent at all. While both rights are protected by *Miranda*, invocation of the right to counsel imposes a higher burden on the police: they must take affirmative action to notify counsel or, in the case of an indigent, to secure an attorney if they wish to proceed with questioning. *Edwards*, 451 U.S. at 484 (1981).

Invocation of the right to remain silent, by contrast, imposes no such burden. The police must merely stop questioning. The unequivocal-invocation rule of *Davis* is the product of that difference and is intended to "avoid difficulties of proof and to provide guidance to officers conducting interrogations. . . ." *Davis*, 512 U.S. at 458-59. "The applicability of the rigid prophylactic rule of *Edwards* requires courts to determine whether the accused *actually invoked* his right to counsel." *Id.* at 458 (internal quotations omitted). Hence, the rule for invoking the right to counsel is more demanding of the accused than the rule for invoking the right to remain silent, *i.e.*, if the suspect indicates "in any manner" that he does not want to talk. *Miranda*, 384 U.S. at 444, 473.

B. Some Circuits Adhere Erroneously to the *Davis*-Trumps-*Miranda* Rule Applied Below, But Circuit Law is Unsettled.

The Eleventh Circuit does not stand alone in contradicting *Miranda*. The *Davis* standard was approved and applied in *United States v. Johnson*, 56 F.3d 947 (8th Cir. 1995), *United States v. Jernigan*, 56 F.3d 74 (9th Cir. 1995) (unpublished), and *United States v. Banks*, 78 F.3d 1190, 1197 (7th Cir. 1996). The Tenth Circuit appears to be the most recent circuit to adopt this rule, in *United States v. Nelson*, 450 F. 3d 1201, 1211-12 (10th Cir. 2006):

> *Davis* specifically addressed the component of the *Miranda* warnings that involves the right to counsel rather than the right to remain silent. "Nonetheless, every circuit that has addressed the issue squarely has concluded that *Davis* applies to both components of *Miranda*: the right to counsel and the right to remain silent." *Bui v. DiPaolo*, 170 F.3d 232, 239 (1st Cir. 1999) (collecting cases).

The First, Seventh, Eighth, and Ninth Circuits have taken the position that *Davis* controls an arrestee's attempt to invoke the right to remain silent. But, as the First Circuit conceded, "*Davis* does not 'authoritatively' answer the question . . . ." *Bui*, 170 F.3d at 239. Additionally, the Fifth Circuit has "decline[d] to address" whether the *Davis* standard should be applied to invocations of the right to remain silent. *Soffar v. Cockrell*, 300 F.3d 588, 594 n.5 (5th Cir. 2002). The Second Circuit assumed without deciding that *Davis* applied to invocations of the right to remain silent. *United States v. Ramirez*, 79. F.3d 298, 305 (2d Cir. 1996). The law is not settled.

A striking marker of uncertainty in the law is inconsistency within the Eleventh Circuit itself. Initially, the law[2] of the Eleventh Circuit was clear: "Where defendant's post-*Miranda* utterance is an ambiguous expression of his desire to remain silent, that utterance should receive the same treatment as naked silence." *United States v. Johnson*, 558 F.2d 1225, 1228 (5th Cir. 1977) (finding prejudicial error in admission of such evidence). *Johnson* was reaffirmed in *United States v. Pena*, 897 F.2d 1075, 1081 (11th Cir. 1990). The only plausible explanation for the subsequent deviation from prior-panel precedent, reflected in the decision below, is the implicit mistaken assumption that the *Davis* unequivocal test for invoking the right to counsel displaced the *Miranda* test (in any manner) for invoking the right to remain silent.

II. After Receiving *Miranda* Warnings Promising That He May Remain Silent, An Arrestee's Response "I Don't Want To Incriminate Myself" Violates *Doyle v. Ohio* When Used By The Prosecutor As Evidence Of Guilt in The State's Case In Chief.

As a matter of law, the statement "I don't want to incriminate myself" is sufficient to invoke the *Miranda* right to remain silent. For the court below to hold otherwise was contrary to or a clearly unreasonable application of *Miranda*'s "in any manner" rule. Williams' statement, made in immediate response to Murray's accusations, was completely unlike Davis' statement, "Maybe I should talk to a lawyer." In fact, Davis affirmatively withdrew his own tentative thought, saying "No, I don't want a lawyer." *Davis*, 512 U.S. at 455. By contrast, there was nothing ambiguous about Williams' invocation, "I don't want to incriminate myself." Indeed,

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[2] Shortly after its creation, the Eleventh Circuit adopted all Fifth Circuit decisions rendered before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Detective Murray clearly understood, as would any reasonable officer, that Williams was asserting his right to end questioning.

The court of appeals held that "Williams' equivocal statement regarding his desire not to incriminate himself could be construed as part of his admission . . . ." *Williams*, 195 Fed. Appx. at 941. In other words, his response to Murray was a mixed response, part admission and part invocation. Taking that interpretation at face value, the portion that clearly was an invocation ("I don't want to incriminate myself") should have been suppressed by defense motion under *Miranda*.

But even if Williams' response be deemed a failed invocation, it had no proper place in the prosecution's evidence—not in rebuttal and most certainly not in the case in chief. As the Eleventh Circuit itself held, before it lost its way, "virtually any description of a defendant's silence following arrest and a *Miranda* warning will constitute a *Doyle* violation." *United States v. Rosenthal*, 793 F.2d 1214, 1243 (11th Cir. 1986).

Even the Circuits that have replaced the *Miranda* "in any manner" rule with *Davis*' unequivocal invocation rule do not go to the extreme approved by the Eleventh Circuit here. Cases from other circuits simply uphold denial of a motion to suppress a defendant's substantive, factual statement when invocation is not clear. They do not authorize what was done in this case: allowing the prosecutor to use the failed invocation against the defendant at trial. It is one thing to say that the *Miranda* shield has not been effectively raised by the arrestee; it is quite another to hold that the failed attempt to raise the shield becomes a sword in the hands of the prosecutor. Both *Miranda* and *Doyle* are violated by such use at trial.

There are issues of great constitutional importance. They arise because of uncertainty among the circuits as to the constitutional rule to apply to an arrestee's attempt to invoke

the right to remain silent and the evidentiary consequences of the arrestee's effort if it fails. This Court should end the uncertainty by granting review.

CONCLUSION

The petition for a writ of certiorari should be granted to allow briefing on the merits and oral argument. The decision below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed SEPT. 15, 2006]

No. 05-16817
Non-Argument Calendar

D.C. Docket No. 04-60356-CV-CMA

CHARLES WILLIAMS,
Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
James McDonough, Secretary,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(September 15, 2006)

Before BLACK, BARKETT and PRYOR, *Circuit Judges.*

PER CURIAM:

Charles Williams, a Florida prisoner, appeals the denial of his petition for a writ of habeas corpus. We affirm.

I. BACKGROUND

Williams was arrested for sexual abuse of a child. At the time of his arrest, after he had been read and had waived his *Miranda* warnings, Williams stated, "This is being blown out of proportion. I've touched her; she is always teasing me, but I don't want to incriminate myself" After he made the statement, the officer that arrested Williams ceased his questioning.

At trial, the prosecution used Williams's statement to the arresting officer three times. On each occasion, Williams's attorney objected and argued that the prosecutor had commented on Williams's right to remain silent. The trial court overruled each objection and found that Williams's statement was appropriate as part of his confession.

On direct appeal, the Florida District Court of Appeals affirmed the admission of the statement. *See Williams v. State*, 755 So.2d 714, 717 (Fla. Dist. Ct. App. 1999). On collateral review before the Florida courts, Williams argued that his counsel was ineffective for failure to suppress the incriminating statement before trial. The Florida courts ruled that the claim was procedurally barred because Williams had raised the issue on direct appeal.

On federal habeas review, the district court ruled that Williams's counsel was not ineffective for failure to move to suppress the incriminating statement because there was not a reasonable probability that the trial court would have granted the motion. The district court also ruled that the affirmance on direct appeal of the decision to admit the statement was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent.

II. STANDARD OF REVIEW

"In examining a federal district court's denial of a [section] 2254 habeas petition, we review questions of law *de novo* and findings of fact for clear error." *Occhicone v. Crosby*, 455 F.3d 1306, 1308 (11th Cir. 2006).

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal district court may not grant the petition for a writ of habeas corpus of a state prisoner

> . . . with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "A state-court decision will . . . be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [those] cases." *Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 1519 (2000). "A state-court decision will also be contrary to [the Supreme Court's] clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [that] precedent." *Id.* at 406, 120 S. Ct. at 1519-20. "[W]hen a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case, a federal court applying [section] 2254(d)(1) may conclude that the state-court decision falls within that provision's 'unreasonable application' clause." *Id.* at 409, 120 S. Ct. at 1521. The factual determinations of the state court "shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254 (e)(1).

III. DISCUSSION

A defendant has a right to remain silent, and the invocation of that right cannot be used against the defendant. *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S. Ct. 2240, 2241 (1976). To avail himself of the right to remain silent, a defendant must make an unequivocal invocation of that right. *Coleman v. Singletary*, 30 F.3d 1420, 1424 (11th Cir. 1994); *see Davis v. United States*, 512 U.S. 452, 461-62, 114 S. Ct. 2350, 2356 (1994). The "primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis*, 512 U.S. at 460, 114 S. Ct. at 2356. Whether an invocation of the right to silence is unequivocal is determined by an objective inquiry. *Medina v. Singletary*, 59 F.3d 1095, 1101 (11th Cir. 1995).

Williams argues that his counsel was ineffective for failure to obtain the suppression of Williams's statement that Williams "[didn't] want to incriminate [himself]." Williams argues that the statement was an invocation of his right to remain silent and its admission violated his right to due process. We disagree.

Because Williams's equivocal statement regarding his desire not to incriminate himself could be construed as part of his admission, the determination of the Florida courts that Williams's statement was not an invocation of his right to remain silent was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent. Likewise, Williams's counsel was not ineffective for failing to file a motion to suppress Williams's statement because the statement was admissible. There is no likelihood that a motion to suppress the statement would have been granted.

IV. CONCLUSION

The denial of Williams's petition for habeas corpus is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed MAY 03, 2007]

No. 05-16817-BB

CHARLES WILLIAMS,
Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
James McDonough, Secretary,
Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BLACK, BARKETT and PRYOR, *Circuit Judges.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ William H. Pryor, Jr.
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)